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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 212

HURON HOLDING CORPORATION, a corporation, and NATIONAL SURETY CORPORATION, a corporation,

Petitioners,

vs.

LINCOLN MINES OPERATING COMPANY, a corporation,

Respondent.

REPLY BRIEF BY LINCOLN IN RESPONSE TO BRIEF OF HURON IN OPPOSITION TO RESPONDENT'S PETITION FOR REHEARING

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STATEMENT AND ARGUMENT

For brevity sake wherever in this brief it becomes necessary to refer to Huron Holding Corporation and National Surety Corporation, petitioners for certiorari, the word Huron will be used. And wherever it becomes necessary to refer to Lincoln Mines Operating Company, respondent and petitioner for rehearing, the word Lincoln will be used.

Huron has filed a brief in opposition to Lincoln's petition for rehearing and an opportunity has been given Lincoln to reply thereto. It is urged in Huron's brief that Lincoln has never raised any issue of the failure of Huron to notify Lincoln of the attachment proceedings against it or to set up any defenses in its behalf, or that it was negligent in any manner with respect thereto, and at the bottom of page nine of Huron's Brief for the purpose of showing that no contention whatever was made in the Court below other than the issue set forth in the quotation, which quotation from the brief of Appellant in the Circuit Court of Appeals is as follows:

> "The entire question to be determined is whether a defendant, against whom a judgment in a tort action (claim and delivery) has been entered in the United States District Court in Idaho, may be garnished in the New York Court on account of such judgment, pending his appeal therefrom to the United States Circuit Court of Appeals for the Ninth Circuit."

The above quotation being only a part of the argument set forth in the Circuit Court of Appeals is deceptive and unfair. It falls within the rule that a half truth is sometimes a falsehood. The full quotation from Lincoln's Brief in the Circuit Court of Appeals is as follows: (top of page 20)

> "The entire question to be determined is whether a defendant, against whom a judgment in a tort action (claim and delivery) has been entered in a United States District Court in Idaho, may be garnished in a New York Court on account of such judgment, pending his appeal therefrom to the United States Circuit Court of Appeals for the Ninth Circuit. The appellant con-

tends that he cannot, and that the garnishment being ineffective the New York Court had no jurisdiction to enter judgment against appellant here, appellant not having been personally served in New York and not appearing therein, nor to issue execution thereon, *nor to require payment by, or receive from, the garnishee any sum as the property of appellant.*

The trial court, upon the motions, correctly stated in its opinion, and we anticipate no contrary contention by appellee, that:"

> *"The jurisdiction of the New York Court depends upon the attachment."*

Again on page forty-one of Lincoln's Brief in the Circuit Court of Appeals referring to Huron, the appellant said:

> "That it was negligent, or voluntarily paid when it was not legally required to do so, is no reason why appellant should be deprived of its rights, nor why the judgment in Idaho should be satisfied."

Further quoting from Drake on Attachments the brief states, on page 41:

> "It is said that 'a negligent garnishee is no more entitled to protection than any other negligent party, and he is as much bound to look after the proceedings against him and protect himself from an improper judgment, as a defendant in an ordinary suit. If by his failure in this respect the plaintiff gain an advantage over him, he is without relief.' Drake on Attachment, Sec. 6582."

A conclusive answer to all of the arguments of what was raised in the Courts below, or in this Court, or at any stage of the proceeding, is found in the following facts and the conclusions of law that flow therefrom.

Huron made a motion for satisfaction of judgment (tr. 9-16). Positively no date is shown when that motion was filed. Huron amended its motion for satisfaction of judgment on the 29th day of March, 1939 (tr. 42-44). Lincoln filed a motion for judgment on appeal bond March 14, 1939 (tr. 33-35). This motion was against the Surety Corporation, surety for Huron Holding Corporation. National Surety Corporation, from whom it was sought to collect the judgment against Huron, filed its answer to the motion of Lincoln for judgment against it as aforesaid March 22, 1939 (tr. 35-42). It amended its said answer to the motion of Lincoln March 29, 1939 (tr. 44-45). It does not make a particle of difference whether the motion of Huron can be said to be a complaint or an answer, or in the nature of a complaint or an answer. It was seeking relief to have its judgment satisfied. The very foundation of the motion demanded of it that it state facts in that motion sufficient to entitle it to the relief demanded herein, or that it must state facts sufficient to constitute a cause of action. The very basis of the relief demanded was to show that it was entitled to have the judgment of Lincoln against it satisfied on account of the attachment proceedings. In order to do that it was incumbent upon it to allege and prove that it had notified Lincoln that the judgment against it in Lincoln's favor had been attached, and its failure to do so was fatal to that right, as was said by this Court in Harris vs. Balk, 198 U. S. 215, 49 Law Ed. 1023, cited by Lincoln in its petition for rehearing, and upon which it relies. Huron did none of the things required of it to be done, but instead it received its notice of attachment July 12, 1938 and on July

15, 1938 (three days later) it notified the Trust Company, its mother, owner and creator, that it owed the money to Lincoln, the amount of the judgment still unpaid (tr. 29-30-31).

American Jurisprudence, Vol. 5, Page 682, states so clearly the rule and cites Harris vs. Balk, Supra, by this Court as follows:

> "The view has been taken that in an action against a nonresident defendant who is served with notice of the same constructively only, as by publication, it is the duty of a garnishee to notify such principal defendant of such garnishment proceedings, if he is able to do so, and also to interpose in behalf of such principal defendant any defense thereto of which he is cognizant and which he is able to make."

It can be seen from the foregoing rule that even where there is constructive service the garnishee must notify its creditor. Instead of that, what are we confronted with? Attempted vague inference that on account of attorneys having given notice that they claimed a lien for their services upon the cause of action (tr. 8-9), and that because on the 13th day of March, 1939 the attorneys for Lincoln gave a receipt for a partial satisfaction of the judgment covered by their lien, that they knew an attachment had been run. No mention whatever is directly or indirectly disclosed of any attachment proceeding or knowledge thereof, yet this Court is urged to accept this unwarranted inference that the solemn duty of Huron to notify Lincoln immediately so it could make its defense had been complied with.

But this is all separate and apart from the fact that Huron in its motion to satisfy the judgment never stated facts sufficient to entitle it to relief, and it never proved any, namely that it had given this imperative notice.

Now what did the National Surety Company do? It filed its answer to the motion of Lincoln for judgment against it. It also filed its amendment thereto as aforesaid. The fact that it set forth no facts constituting a defense, which was incumbent upon it in order to justify itself, and to have the judgment satisfied, it should have pleaded and proved that its principal for which it was surety gave the notice the law demands of it, and this it did not do, hence it stated no facts constituting a defense.

Here we have the situation of neither Huron nor National Surety Corporation justifying themselves by pleading the facts and proving them, showing that they were entitled to have the judgment satisfied, the very foundation of which was the giving of notice by Huron to its creditor Lincoln, yet the learned counsel endeavors by intricate argument to show that it was the duty of Lincoln to plead the negligence of Huron and its failure to discharge its duty that the law enjoined upon it to notify its creditor. This rule applies even where constructive service is given by publication, which in this case was never done.

No one contends that an attachment could not have been gotten out in New York.

THE REAL ISSUE HERE IS NEITHER HURON NOR THE NATIONAL SURETY CORPORATION IS IN A POSITION TO ON ACCOUNT OF THEIR BREACH OF DUTY THAT THEY OWED TO LINCOLN TO NOTIFY IT TO ASK AND DEMAND THAT THE JUDGMENT BE SATISFIED.

The question of the insufficiency of the facts set forth in the motion for satisfaction of judgment by Huron, whether it be a complaint or an answer *is never waived. This is fundamentally jurisdictional.* Also the insufficiency of the facts set forth in the answer of the National Surety Corporation to constitute a defense is *never waived and may be raised at any time in any Court.*

There is not a jurisdiction in this land in which the above rule does not hold good, of which every member of this Honorable Court has full and complete knowledge.

When this Court adopted the new Federal Rules of civil procedure, it fully recognized that rule. Under rule 12, paragraph (h), it is provided:

> "Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits."

It may be improper, but Huron has asked for this in their brief in opposition to petition for rehearing on page six as follows:

"It is significant that the petition omits any indication of the nature of such defense."

One of the defenses that could have been urged against Manufacturers Trust Company, of which the Honorable Leonard G. Biscoe, counsel here, has full and complete knowledge, in that he introduced in evidence in what is known as the Ojus Mining Company Case vs. Manufacturers Trust Company and Alexander Lewis, 82 Fed. (2d) 74, a true and correct copy of the very note sued upon, which is as follows:

Bank of Bay Biscayne
of Miami, Fla.

$10,000.00 Miami, Florida, June 14th, 1929

On Demand after Date, For Value Received, I, We, or Either of Us, Jointly and Severally, Promise To Pay To The Order Of Alexander Lewis, Ten Thousand 00/00 Dollare, in gold coin of the United States of America, of the present standard of weight and fineness, or its equivalent, at office of Manufacturers Trust Co. 139 Broadway, New York City, with interest thereon at the rate of 6 per centum per annum from date until fully paid; interest payable semi-annually; deferred interest payments to bear interest from maturity at 6 per centum per annum, payable semi-annually. The makers, signers, sureties, guarantors and endorsers hereof, and all parties hereto, hereby severally waive presentment for payment, demand, protest, notice of non-payment and protest of this note: and should this note be collected through an attorney, each of us, severally whether maker, signer, guarantor, endorser, surety, or otherwise a

party hereto, hereby agrees to pay all costs of such collecting including a reasonable attorney's fees.

Lincoln Mine Operating Co. (SEAL)
By William I. Phillips (SEAL)
President.
.....(SEAL)

Due.....
No.....
P. O. Address
.....

Endorsed on Back on Left Side
Without recourse
Alexander Lewis

Defts. Ex. A
1-31-34
R. W. P.

Paragraph 4 of the Complaint (tr. 18) states in part "That on or about June 14th, 1929, *in the City and State of New York,* (italics ours) defendant, for value received, made and delivered to one Alexander Lewis its written promissory note for $10,000, etc."

This is not true as said note was "made and delivered" in the City of Miami, and State of Florida.

A true and correct copy of an assignment thereof from Manufacturers Trust Company to Huron Holding Corporation is as follows, to-wit:

MANUFACTURERS TRUST COMPANY
to
HURON HOLDING CORPORATION

Defts. Ex. T
2-1-34
R. W. P.

ASSIGNMENT OF NOTE

KNOW ALL MEN BY THESE PRESENTS that MANUFACTURERS TRUST COMPANY, a corpora-

tion duly organized and existing under the laws of the State of New York, for the better assuring, transferring, confirming and assigning unto HURON HOLDING CORPORATION, a corporation duly organized and existing under the laws of the State of New York, the note hereinafter referred to which was by Manufacturers Trust Company assigned to Huron Holding Corporation by assignment dated February 9, 1932, by these presents does hereby sell, assign, transfer and set-over unto Huron Holding Corporation the note dated June 14, 1929 in the principal amount of $10,000. and bearing interest at the rate of 6% per annum, made by Lincoln Mine Operating Co., payable to Alexander Lewis, and all the right, title and interest of Manufacturers Trust Company to the same;

TO HAVE AND TO HOLD the same unto itself, its successors and assigns to its own use forever, with full power and authority in its name or otherwise to demand, collect, institute legal proceedings and receive any and all sums of money which are or shall be or become due, owing and payable by or on account of said note.

It is understood and agreed and is a condition hereof that said Huron Holding Corporation, its successors or assigns, shall in no event have any recourse against said Manufacturers Trust Company, its successors or assigns, for the said sums of money and interest, or any part thereof.

IN WITNESS WHEREOF said Manufacturers Trust Company has caused these presents to be signed on its behalf by one of its Vice Presidents and its Secretary this.....day of....., 1932.

MANUFACTURERS TRUST COMPANY

By Jas. H. Conroy

Vice-President

Attest:

Chas. M. Close

Secretary

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On this 26th day of April, 1932, before me came Jas. H. Conroy to me known, who, being by me duly sworn, did depose and say that he resides in the County of Kings; that he is a Vice-President of Manufacturers Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Seal) Leon A. Rosenheim
Notary-Public

Notary Public Kings Co. No. 769.
Reg. No. 3458, Cert. Filed to
N. Y. Co. No. 1065, Reg. No. 3-R-656
Commission expires March 30, 1933

Each of which were introduced in evidence by Leonard G. Biscoe, esquire.

It will be noted that in the complaint upon which the judgmen was had in the New York Court it was alleged that this identical promissory note was endorsed over to Manufacturers Trust Company by Alexander Lewis, another agent and representative of the Trust Company, who has long since been dead.

It will be seen from the foregoing that *when it is convenient for Manufacturers Trust Company to own the note sued upon in New York Courts, it owns the note. When it is more convenient for Huron to own it, Huron owns the note.* And the last evidence we have of who owns the note certain-

ly points to Huron as the owner of the note. This note is dated June 14th, 1929 and for nine years said note was held when a suit could have been brought in Idaho at any time, and prior to any statute of limitation running against the same. The strong inference it seems to us must be, that suit would have been brought on this note in Idaho, but for good defenses which could have been raised against its collection, only one of which has been mentioned herein.

Huron makes the assertion that Lincoln could have opened its default and made its defense. The answer to that is, How can, or how could Lincoln have done so when it had no knowledge whatever that any such proceeding had ever been taken against it? If this Court can find from cover to cover in the transcript before it any evidence that Huron notified Lincoln of the attachment proceedings it will perform a miracle. If such had been the case counsel for Huron would not be put to the desperate circumstances of urging notice on account of the fact that the attorneys had given notice of their attorneys liens and such had been paid. Notice having been given January 27, 1939 and receipt of payment March 8, 1939 (tr. 8-9, 32-33).

"Huron is just another name for the Trust Company."

In answer to that quotation counsel says on page eleven of their brief:

> "The statement that Huron and the Trust Company are identical is not only false, but entirely unsupported by the record."

The above quotation was made from memory and is slightly incorrect. The true quotation is as follows:

> *"The name Huron was simply another name for the Trust Co."*

That is exactly what the Circuit Court of Appeals for the Ninth Circuit, 82 Fed. (2d) 74, at the bottom of page 75 said.

What a deadly parallel! A small excuse for charging false statements and false quotations.

It is urged in the conclusions in the brief of opposition to rehearing that the transcript before this Court is a transcript of Lincoln. Nothing more absurd could be presented. Huron applied to this Court for certiorari and made up its own record. It did not put in its notice of attachment proceeding to Lincoln because none existed, but it did put in its failure and that of National Surety Company in their motions and answers to state facts entitling them to any relief, and it did fail to prove any such facts, which points in law are never waived.

The desire of all Courts is to administer justice.

Technicalities to the contrary notwithstanding.

> "Justice is the constant and perpetual wish to render everyone his due."—Justinian.

Wherefore Lincoln prays that this Court grant its petition for rehearing and enter up judgment affirming the Circuit

Court of Appeals because its decision was right, though it may have been based upon incorrect principles.

Respectfully submitted,

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Boise, Idaho,
Counsel for Respondent.

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